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No. 85-604

In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD A. SCARNATI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner challenges his termination as a Veterans Administration (VA) staff psychiatrist. Following review by a Professional Standards Board (PSB), petitioner's employment was terminated because of "his inability to establish and maintain productive doctor-patient relationships and his failure to follow the instructions of his supervisors" (Pet. App. 6).

1. On September 26, 1982, petitioner was appointed as a physician by the VA and assigned as a staff psychiatrist to the VA Outpatient Clinic in Harrisburg, Pennsylvania (Pet. App. 3-4). According to petitioner, early in his employment at the Clinic, he began refusing to prescribe various drugs that he considered dangerous for chronic use (Pet. 13). Petitioner apparently concedes that he did so despite contrary instructions from his superiors (see *id.* at 14). By January 1983, VA officials were receiving complaints from

patients and other individuals concerning his abrupt medication changes and poor relationships with patients (Pet. App. 4). On June 22, 1983, petitioner received a special proficiency report that gave him an unsatisfactory rating. He was also notified that a three-member PSB would meet to determine whether his employment would be continued or terminated (*id.* at 5).

When the PSB met on July 19, 1983, it reviewed 12 exhibits and heard testimony from petitioner and three of his supervisors. Petitioner addressed the two issues being considered by the PSB: the propriety of his medication procedures and his relationship with patients. At petitioner's request, another meeting was held on August 4, 1983, so that he could further present his case. At the end of the August 4 meeting, the PSB concluded that petitioner's clinical competence was unsatisfactory and recommended termination (Pet. App. 5-6). Following review by a central office board of the VA, the recommendation was approved, and petitioner was notified that his employment would be terminated as of October 13, 1983 (*id.* at 6).

Petitioner brought this action in the United States District Court for the Middle District of Pennsylvania, seeking reinstatement and back pay. The parties stipulated that "[f]or purposes of this action, [petitioner] is to be considered a probationary physician with his appointment and tenure * * * to be governed by 38 U.S.C. § 4106." C.A. Supp. App. 20 (Stip. ¶ 1); see also *id.* at 25 (Stip. ¶ 29). The district court granted the government's motion for summary judgment, holding that petitioner's discharge complied with due process and the VA's statute and regulations (Pet. App. 1-23). The court of appeals affirmed without opinion (*id.* at 24). Petitioner advised the court of appeals by letter dated March 6, 1985, that he began full-time employment as a prison psychiatrist for the Department of Mental Health in Cincinnati, Ohio (Appellee's Br. 13 n.7).

2. The court of appeals' summary affirmance of the district court's fact-bound decision is correct, does not conflict with any decision of this Court or other courts of appeals, and presents no issue warranting this Court's review.

a. Petitioner's principal assertion is that he should be relieved of the stipulation that he was a probationary employee under 38 U.S.C. 4106. It is well settled, however, that parties are bound by stipulations voluntarily made and that relief from such stipulations after judgment is warranted only under exceptional circumstances. See *H. Hackfeld & Co.* v. *United States,* 197 U.S. 442, 446-447 (1905). Even at the trial level, orders and stipulations are not to be set aside except to avoid manifest injustice. See Fed. R. Civ. P. 16(e). Petitioner has not identified any such injustice here, or explained why he should not be bound by the stipulation he entered into on advice of counsel.

Moreover, petitioner raised this issue for the first time in his reply brief in the court of appeals, so that neither court below addressed the issue. "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan* v. *United States,* 274 U.S. 195, 200 (1927) (citations omitted); see also, *e.g., Kosak* v. *United States,* No. 82-618 (Mar. 21, 1984), slip op. 2 n.3; *United States* v. *Lovasco,* 431 U.S. 783, 788-789 n.7 (1977); *Tennessee* v. *Dunlap,* 426 U.S. 312, 314 n.2 (1976).[1]

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[1]Petitioner asserts only that it "appears" he "may have" had nonprobationary status (Pet. 29, 2), and relies only on an employee service statement which includes time in service that does not count toward his probationary period. Petitioner's claim that he was entitled to nonprobationary status because of length of service was expressly rejected elsewhere, in *In re Arbitration Between VA Medical Center & American Federation of Government Employees, Local 1966,* FMCS No. 84K/02649 (Apr. 16, 1984) (Florey, Arb.); petitioner's exception to this ruling was dismissed by the Federal Labor Relations Authority, No. O-AR-771 (Dec. 13, 1984).

b. Petitioner contends (Pet. 21-25) that the VA violated due process and its regulations because he was not given certain documents reviewed by the PSB and because the PSB was not provided certain supposedly "approbative statements" (Pet. 23). As a probationary employee, however, petitioner had no property interest sufficient to implicate due process protections. See *Board of Regents* v. *Roth*, 408 U.S. 564, 576-578 (1972). Nor was any liberty interest infringed. The circumstances of his termination were not the sort to damage seriously his standing and associations in the community. The fact that petitioner has acquired full-time employment in his field demonstrates this; so does the fact that petitioner himself publicized the circumstances of his termination (Pet. App. 12-16). See *Roth*, 408 U.S. at 572-575.

Given petitioner's probationary status, the district court was also clearly correct that he was afforded proper treatment under the VA's own regulations (Pet. App. 17-22). Whether or not petitioner had every document submitted to the PSB, he had "ample notice of the charges being considered" (*id.* at 21; see also *id.* at 22); conversely, petitioner's documents, which he contends the PSB should have considered but did not, were irrelevant, or fell greatly short of being "blanket approvals of [petitioner's] methods," or both (see *id.* at 22).[2] Even assuming arguendo that not submitting these documents was erroneous, petitioner has failed to show why the error was not harmless.

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[2]Petitioner's claim (Pet. 26-29) that he was terminated, contrary to VA regulations, because of a "difference of professional opinion" assumes that termination is inappropriate even when the difference of professional opinion leads to insubordination. This, of course, cannot be the case. Petitioner was fired because of his insubordination and inability to get along with his patients (Pet. App. 6), not because of his opinions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1985

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